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Article

Trust Law of China and Its Uncertainties: Examination of the Rights and Obligations of Trust and Ownership of Trust Property

Ruiqiao Zhang *

ABSTRACT

Because of the trust's advantages in investment, banking, financing and property management, China took the bold step of introducing the trust in 2001. However, as a product of equitable jurisdiction, the trust seemed to be alien to Chinese law, and seemed particularly inconsistent with the Chinese property system. Therefore, China went down a tortuous road upon its introduction of trusts before eventually promulgating the Trust Law of China in 2001. However, the Trust Law of China deliberately leaves open the fundamental question of the introduction of dual ownership of trust property, which results in a number of limitations in the Chinese legislation. For instance, the ambiguous ownership of trust property and the outstanding nature of the beneficiary's rights all bedevil efforts to analyse Chinese trust law. In this paper, the author first investigates the history of trust in China and Legal Reforms of Chinese Trust Business. Based on this analysis, the following section presents a detailed examination of the Trust Law of China and the limitations of the Chinese trust system.

Keywords: *Trust Law of China, Uncertainties of the Chinese Trust System, Rights and Obligations of Trust parties, Trust ownership, History of Trust in China*

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This paper outlines the basic features of the Chinese trust with a view to showing how these features put in place the essential elements of a trust as seen in international practice, and highlights the theoretical and practical challenges of the Chinese approach. It includes three sections: 1. History of Trusts in China, Legal Reforms of Chinese Trust Business, and the Drafting of *Trust Law of People's Republic of China* (hereinafter referred to as the *Trust Law of China*);¹ 2. Regulations of the *Trust Law of China*; and 3. Uncertainties of the Chinese Trust System.

I. HISTORY OF TRUSTS IN CHINA, LEGAL REFORMS OF CHINESE TRUST BUSINESS, AND THE DRAFTING OF THE TRUST LAW OF CHINA

The notion of trusts never found root in dynastic China. Inheritance was predominantly regulated by customary law, and there was little room for testamentary disposition by individuals. Therefore, a trust-like device was not needed for property owners to entrust the management of their property to others.² Starting from 1911 however, when dynastic rule ended and the Chinese Nationalist Party (Kuomintang) took over control of the country, the so-called trust business was operated by trust institutions. At the beginning and lasting until the communist victory in the Civil War, trust institutions were set up inside banks in the form of a department of trust. For example, in 1919, the Shanghai branch of *Ju Xing Cheng* Bank established the department of trust to manage trust business. In addition to the trust institutions within banks, several governmental trust institutions were also enacted, such as the Central Trust Bureau and Shanghai *Xingye* Trust. With them came regulation, an example being the two significant trust rules promulgated by the Central Trust Bureau in 1945: the *Issuing Measures of Securities and Trust* and *Regulations of Issuing Investment Trust and Securities*.³ Finally, a third type of trust institution was broadly adopted at that time, and still exists as a major use of trust in China: “the trust company”. In August 1921, the first trust company, *Tongshang* Trust Company of China was established in Shanghai; and quickly within the next

1. Zhonghua Renmin Gongheguo Xintuo Fa (中华人民共和国信托法) [Trust Law of the People's Republic of China] (promulgated by the Standing Comm' Nat'l People's Cong. Apr. 28, 2001, effective Oct. 1, 2001), 2001(4) STANDING COMM' NAT'L PEOPLE'S CONG. GAZ. 311 (China) [hereinafter Trust Law of China].

2. Lusina Ho, *Trust Laws in China: History, Ambiguity and Beneficiary's Rights*, in RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW 183, 186-87 (Lionel Smith ed., 2012).

3. WU HONG (吴弘), JIA XILING (贾希凌) & CHENG SHENG (程胜), XINTUO FA LUN—ZHONGGUO XINTUO SHICHANG FAYU FAZHAN DE FALU TIAOZHENG (信托法论—中国信托市场发展发展的法律调整) [TRUST LAW: LEGAL REGULATIONS OF THE DEVELOPMENT OF CHINA TRUST MARKET] 25-26 (2003).

month, twelve similar trust companies⁴ sprang up in China.⁵

These trust companies came to a halt after the Communist takeover in 1949. They obtained a new lease of life in 1979, when China adopted an open-door policy for foreign trade and investment. The trust companies provided the government with flexible avenues for financing outside the rigid state-planned budget.⁶ The first trust and investment company of the People's Republic of China, China International Trust and Investment Corporation, was established with the approval of State Council in Beijing on October 4th, 1979.⁷ From 1979 to 1988, a number of provinces, cities and financial institutions set up their own trust and investment companies and the number of trust and investment companies rose up to more than one thousand.⁸ This period also saw the introduction of a new form of commercial trust, the collective capital trust, only operable by trust companies.⁹ Moreover, charitable trusts were also established in this period. The first charitable trust, the *Soong Ching Ling Foundation*, was formed in 1982. Over the following decade, a number of these kinds of trusts were rapidly established. In order to regulate these charitable trusts, State Council promulgated *the Regulations for the Management of Foundations*¹⁰ in September 1988.¹¹

As the flexibility of trusts in managing the assets of others has been recognized in common law jurisdictions, China sought to develop its legal infrastructure to include trusts. As the 1980s wore on, this project acquired new urgency: with the development of international trade and the growth of private wealth in China after its economic reforms, China was keen to adopt the trust as a means of establishing a modern system for the fiduciary management of assets.¹² Nevertheless, due to the lack of adequate legal

4. The 12 trust companies are Zhongyi, Zhongguo, Shangye, Tongyi, Dazhonghua, Zhongyang, Shanghai, Tongshang, Shenzhou, Zhongwai, Huasheng, and Shanghai Yunshi.

5. HUO YUFEN (霍玉芬), XINTUO FA YAOLUN (信托法要论) [SUMMARY DISCUSSIONS OF TRUST LAW] 27-28 (2003).

6. *Id.* at 28-29.

7. GUAN JINGXIN (关景欣), ZHONGGUO XINTUO FALU CAOZUO SHIWU (中国信托法律操作实务) [TRUST LAW PRACTICE IN CHINA] 25 (2008).

8. TANG JINSHU (汤津殊) & CHAO RAN (赵然), JINRONG XINTUO YU JINRONG SHICHANG (金融信托与金融市场) [FINANCIAL TRUST AND FINANCIAL MARKET] 29 (1990).

9. Lusina Ho, Rebecca Lee & Jin Jinping, *Trust Law in China: A Critical Evaluation of Its Conceptual Foundation*, in TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 80, 80 (Lusina Ho & Rebecca Lee eds., 2013).

10. Jijinhui Guali Banfa (基金会管理办法) [Regulations for the Management of Foundations] (promulgated by the State Council of the People's Republic of China Sept. 27, 1988, abolished Jun. 1, 2004) (Lawinfochina) (China). It was replaced by Jijinhui Guanli Tiaoli (基金会管理条例) [Regulation on Foundation Administration] (promulgated by the State Council of the People's Republic of China Jun. 1, 2004) (Lawinfochina) (China).

11. HUO, *supra* note 5, at 29-30.

12. Qi Dan (漆丹) & Yan Lin (晏琳), *Xiandai Xintuo Gongneng Zaitan* (现代信托功能再探) [Restudy of the Functions of Modern Trust], 2005: 4 J. OF SHAOYANG UNI. SOC. SCI. 44 (2005).

norms and theoretical supports, the trust developed in an unusual way. Due to the government's active promotion of this form of fiduciary management, Chinese trusts rapidly over-expanded, as the trust and investment companies operated an excessively broad scope of business, including traditional banking activities such as the management of retail and corporate loans and deposits.¹³ More specifically, the trust companies engaged in trust loans, trust investments and trust deposits, activities which were effectively deposit-taking activities authorized by the lack of legal requirements for the segregation of investor and trustee funds. Whatever profits or losses accrued went to the trust and investment companies rather than to the customers.¹⁴

Facing this highly irregular expansion of trusts, the Chinese government tried to correct its inappropriate promotion and to regulate trust business via legal reforms, i.e. a series of "rectifications" dating from 1988 to 1998 in which trust institutions were separated from banks.¹⁵ The number of trust and investment companies was reduced to two hundred and thirty-nine by the end of 1998. The fifth, and most significant rectification, took place 1998, when the *Guangdong International Trust and Investment Corporation* was acquired by the *People's Bank of China* (hereinafter referred to as *PBC*)¹⁶ and forced into liquidation. A further culling of companies with

13. GUAN, *supra* note 7, at 11.

14. Ho, *supra* note 2, at 188-89.

15. Su Dongsheng (苏东升), *Xintuo Yu Shuishou* (信託與稅收) [Trusts and Taxes], 2006(11) SHIDAI JINRONG (时代金融) [TIMES FINANCE] 67 (2006).

16. The People's Bank of China was established on Dec. 1, 1948 based on the consolidation of the Huabei Bank, the Beihai Bank and the Xibei Farmer Bank. In Sept. 1983, the State Council decided to have the PBC function as a central bank. Zhonghua Renmin Gongheguo Zhongguo Renmin Yinhang Fa (中华人民共和国中国人民银行法) [Law of the People's Republic of China on the People's Bank of China] (promulgated by the Standing Comm' Nat'l People's Cong. and effective March. 18, 1995) (Lawinfochina) has since legally confirmed the PBC's central bank status. With the improvement of the socialist market economic system, the PBC, as a central bank, will play an even more important role in China's macroeconomic management. The amended Zhonghua Renmin Gongheguo Zhongguo Renmin Yinhang Fa (中华人民共和国中国人民银行法) [Law of the People's Republic of China on the People's Bank of China] (promulgated by the Standing Comm' Nat'l People's Cong. Dec. 27, 2003, effective Feb. 1, 2004) (Lawinfochina) provides that the PBC performs the following major functions: (1) Drafting and enforcing relevant laws, rules and regulations that are related to fulfilling its functions; (2) Formulating and implementing monetary policy in accordance with law; (3) Issuing the Renminbi and administering its circulation; (4) Regulating financial markets, including the inter-bank lending market, the inter-bank bond market, foreign exchange market and gold market; (5) Preventing and mitigating systemic financial risks to safeguard financial stability; (6) Maintaining the Renminbi exchange rate at adaptive and equilibrium level; Holding and managing the state foreign exchange and gold reserves; (7) Managing the State treasury as fiscal agent; (8) Making payment and settlement rules in collaboration with relevant departments and ensuring normal operation of the payment and settlement systems; (9) Providing guidance to anti-money laundering work in the financial sector and monitoring money-laundering related suspicious fund movement; (10) Developing statistics system for the financial industry and responsible for the consolidation of financial statistics as well as the conduct of economic analysis and forecast; (11) Administering credit reporting industry in China and promoting the building up of credit information system; (12) Participating in international financial activities at the capacity of the central bank; (13) Engaging in financial business operations in line with relevant rules; (14) Performing other functions prescribed by

payment difficulties, insufficient assets, or poor management, reduced the number of trust and investment companies to fifty-eight.¹⁷

The experience of the four rectifications had become one of the primary reasons for initiating the drafting of the *Trust Law of China* in 1993.¹⁸ In other words, the *Trust Law of China* aimed at regulating trust business.¹⁹ After three years of efforts, the working group proposed a draft on November 29, 1996, which included six chapters: general provisions, the relationship between trust parties, special provisions of charitable trust, trust companies, legal liabilities of trust, and supplementary provisions.²⁰ Nevertheless, how exactly China regulates trust companies is a subject that still needs further research. For the purposes of this paper however, suffice it to note that, since the supervision of the trust business should be governed by public law, the specific way in which the trust industry is governed is ontologically separate from the laws surrounding the institution of trust. This fact is recognized in other civilian jurisdictions such as Japan, South Korea and Taiwan.²¹ The Law Committee of National People's Congress revised the legislative purpose of the *Trust Law of China* to regulate the relationship between trust parties and deleted the provisions regarding trust companies in the draft.²²

After almost eight years of drafting, China promulgated the *Trust Law of China* (the third draft) on 28 April 2001. The act came into effect on 1 October 2001,²³ making China one of the first socialist and civil law jurisdictions to have introduced a domestic law of trusts. This trust law has attracted much attention, both in China and overseas. "First, [because] there is much hope in China that the Law will put in place an important legal instrument for the professional management of assets and, ultimately, for modernizing China's financial infrastructure. Second, [because] the Chinese experiment might be useful to civil law jurisdictions generally as an illustration of how thorny issues regarding the reception of the common law

the State Council.

17. GUAN, *supra* note 7, at 11-12.

18. Before the *Trust Law of China*, the Chinese trust was regulated by the Jinrong Xintuo Touzi Jigou Guanli Zhanxing Guiding (金融信托投资机构管理暂行规定) [Provisional Regulations on the Management of Financial Trust Investment Institutions] promulgated in Apr. 1986 and the Zhongguo Renmin Yinhang Jinrong Xintuo Touzi Jigou Zijin Guanli Zhanxing Banfa (中国人民银行金融信托投资机构资金管理暂行办法) [Provisional Regulations on the Capital Management of Financial Trust Investment Institutions] promulgated in Dec. 1986.

19. ZHOU XIAOMING (周小明), XINTUO ZHIDU: FALI YU SHIWU (信托制度：法理与实务) [TRUST LEGISLATION: THEORIES AND PRACTICE] 24 (2012).

20. *Id.* at 24-25.

21. WU, JIA & CHENG, *supra* note 3, at 41.

22. ZHOU, *supra* note 19, at 25, 27.

23. China is not a party to the Hague Convention. Therefore the Trust Law of China contains no provision on choice of law rules and it is applicable to trust activities carried out in China.

trust can be tackled,”²⁴ analysts have been examining the law upon a number of grounds. It is worth noting that when the *Trust Law of China* was drafted, the initial and most typical kind of trust existing in China was the commercial trust used as a mechanism to facilitate investment, financing and property management, not the trust that used for management of intergenerational wealth. Therefore, as shown in the history of the development of trusts in China, trusts created by wills can barely be found in Chinese law.

In addition to the *Trust Law of China*, further legislation and regulations have been passed to provide for the use of the trust in financial arrangements focusing on the regulation of trust and investment companies.²⁵ For example, *Law of the People's Republic of China on Securities Investment Funds*,²⁶ *The Measures for the Administration of Trust Companies*,²⁷ and *The Rules for Administration of Collective Capital Trust Plans*.²⁸ Thanks to its these laws and regulations, China's trust business has rapidly developed: its total revenue has increased from RMB 21.9 billion in 2007 to 63.8 billion in 2012 (an increase of 191.32%), and total industry profits have increased from 15.8 billion in 2007 to 44.1 billion in 2012 (an increase of 179.11%).²⁹

II. REGULATIONS OF THE TRUST LAW OF CHINA AND THEIR UNCERTAINTIES

From these notions of the history of trusts in China, it is not hard to see that China has gone through a number of difficulties in introducing trusts, and that its notion of trust has evolved differently from common law's conception of trust.

The *Trust Law of China* is comprised of seventy-four articles in seven

24. LUSINA HO, *TRUST LAW IN CHINA* 2 (2003).

25. GAO LINGYUN (高凌云), *BEI WUDU DE XINTUO—XINTUO FA YUANLUN* (被误读的信托—信托法原论) [THE MISUNDERSTOOD TRUST: PRINCIPLES ON TRUST LAW] 277 (2010).

26. *Zhonghua Renmin Gongheguo Zhengquan Touzi Jijin Fa* (中华人民共和国证券投资基金法) [Law of the People's Republic of China on Securities Investment Funds] (Adopted at the fifth Session of the Tenth Nat'l People's Cong., promulgated by Order No. 9 of the President of the People's Republic of China on Oct. 28, 2003, and effective as of Jun. 1, 2004) (Lawinfochina) (China).

27. *Xintuo Gongsì Guanli Banfa* (信托公司管理办法) [The Measures for the Administration of Trust Companies] (promulgated by the China Banking Regulatory Comm. Jan. 23, 2007, effective Mar. 1, 2007, amended Dec. 17, 2008) (Lawinfochina) (China).

28. *Xintuo Gongsì Jihe Zijin Xintuo Jihua Guanli Banfa* (信托公司集合资金信托计划管理办法) [The Rules for Administration of Collective Capital Trust Plans] (promulgated by the China Banking Regulatory Comm. Jan. 23, 2007, effective Mar. 1, 2007, amended Dec. 17, 2008) (Lawinfochina) (China).

29. ZHIXIN ZICHAN GUANLI YANJIUYUAN (智信资产管理研究院), *ZICHAN GUANLI LANPISHU—ZHONGGUO XINTUO YE FAZHAN BAOGAO* (2013): *DA ZICHAN GUANLI SHIDAI DE XINTUO YE* (资产管理蓝皮书—中国信托业发展报告中国信托业发展报告(2013):大资产管理时代的信托业) [BLUE BOOK OF ASSET MANAGEMENT: ANNUAL REPORT ON THE DEVELOPMENT OF CHINA'S TRUST INDUSTRY (2013)] 89-90 (2013).

chapters. General provisions are found in Chapter I (articles 1 to 5), the creation of the trust in Chapter II (articles 6 to 13), trust property in Chapter III (articles 14 to 18); regulations concerning the trust parties – settlor, trustee and beneficiary – in Chapter IV (articles 19 to 49), modification to and termination of a trust in Chapter V (articles 50 to 58), and the charitable trust in Chapter VI (articles 59 to 73). Supplementary provisions are found in the last chapter (article 74). This section provides a detailed examination of the provisions of the *Trust Law of China*, focusing on the regulations of Chapter IV, i.e. the rights and obligations of the settlor, trustee and beneficiary.

Chapter I, article 2 defines the trust as a situation where “the settlor, based on his faith in trustee, entrusts his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes.”³⁰ It stipulates the property right of the trustee as a wider legal definition of the notion of property where it relates to the ownership of property to competing rights. It embraces real property, the interest arising from a real property and personal property.³¹ In order to facilitate the management and administration of the trust, the main purpose of the *Trust Law of China* is to “regulate trust relationship, to standardize trust acts, [and] to protect the lawful rights and interests of the parties involved in a trust.”³² Therefore, Chapter IV, adopting many articles, stipulates the legal rights and obligations of the settlors, trustees, and beneficiaries.

A. *Rights and Obligations of the Settlor*

This section examines the Chinese regulations of the rights and obligations of the settlor, points out its unique provisions, and analyzes the reasons for these provisions as well as problems arising from these provisions.

In the *Trust Law of China*, a settlor is defined as “a natural person, a legal person, or an organization established in accordance with law that has full capability for civil conduct.”³³ · ³⁴ The settlor is conferred a broad

30. Trust Law of China § 2.

31. MARK HSIAO, FINANCIAL REGULATION OF BANKING DERIVATIVES, SECURITIZATIONS AND TRUSTS IN CHINA 224 (2009).

32. Trust Law of China § 1.

33. *Id.* § 19.

34. Zhonghua Renmin Gongheguo Minfa Tongtze (中华人民共和国民法通则) [General Principle of the Civil Law of the People's Republic of China] (promulgated by the Standing Comm' Nat'l People's Cong. Apr. 12, 1986, effective Jan. 1, 1987), 1986 STANDING COMM' NAT'L PEOPLE'S CONG. GAZ. 3, § 11 (China). The article states the definition of natural person with full capability for civil

information power which allows him to access “the administration, use and disposition of, and the income and expenses relating to, his trust property [and] to request the trustee to give explanations in this regard. [He also has] the right to check, transcribe or duplicate the trust accounts related to his trust property and other documents drawn up in the course of dealing with trust business”.³⁵

Moreover, the settlor is given the power to ask the trustee to modify his administration when the methods for the administration “are not favorable to the realization of trust purposes or do not conform to the interests of the beneficiary [or] due to special reasons unexpected at the time the trust is created”.³⁶ Article 22 provides a similar remedy of restitution to the settlor, allowing him to annul the trustee’s disposition and restore trust property when the trustee disposes of the trust property in breach of the purposes of the trust, or causes losses to the trust property due to his departure from his administrative duties or improper handling of trust business. In these cases, it is the settlor who can “apply to the People’s Court for annulling such disposition [and] to ask the trustee to restore the property to its former state or make compensation.”³⁷ While this right is subject to statutory limitations, it has to be exercised “within one year beginning from the date [the settlor] comes to know or should have known the reason for annulling the disposition, [otherwise] such right shall cease to exist”.³⁸ Alternatively, the settlor also has the right to “dismiss the trustee according to the provisions in the trust documents or apply to the People’s Court for dismissing him”.³⁹ In relation to charitable trusts, the settlor can file a lawsuit at the People’s Court when “the public welfare administration authority violates” the provisions of the *Trust Law of China*.⁴⁰

The settlor is also granted the powers to resolve uncertainties or disputes relating to the administration of the trust. In the absence of a provision in the trust instrument, the settlor has the right to give consent to transactions conducted by the trustee between his own property and trust assets at fair

conduct that “a citizen aged 18 or over shall be an adult. He shall have full capacity for civil conduct, may independently engage in civil activities and shall be called a person with full capacity for civil conduct. A citizen who has reached the age of 16 but not the age of 18 and whose main source of income is his own labor shall be regarded as a person with full capacity for civil conduct.” The definition of legal person is found in § 37 of the General Principles of Civil Law, stating that: “A legal person shall have the following qualifications: (1) establishment in accordance with the law; (2) possession of the necessary property or funds; (3) possession of its own name, organization and premises; and (4) ability to independently bear civil liability”.

35. Trust Law of China § 20.

36. *Id.* § 21.

37. *Id.* § 22.

38. *Id.*

39. *Id.* § 23.

40. *Id.* § 73.

market price,⁴¹ to resolve disagreements between joint trustees in the administration of trust,⁴² or to enter into a supplementary agreement with the trustee and the beneficiary to authorize remuneration to the trustee.⁴³ He can also consent to the trustee's resignation⁴⁴ or to appoint a new trustee after termination of the trustee's appointment.⁴⁵ Moreover, upon the termination of the trust, as a consequence of the trustee's removal, bankruptcy, loss of legal qualifications, resignation, dismissal or other circumstances stipulated in laws or administrative regulations, the settlor has the right to approve the report submitted by the trustee on his administration of the trust.⁴⁶

Additionally, it is even possible for the settlor to terminate the trust through consultation with the trustee and beneficiary.⁴⁷ Alternatively, when the settlor is the trust's sole beneficiary, and in the absence of provision in the trust instrument, he can revoke the trust himself.⁴⁸ Moreover, according to article 51, "the settlor may replace the beneficiary or dispose of his right to benefit from the trust under one of the following circumstances: (1) the beneficiary commits a major tort against the settlor; (2) the beneficiary commits a major tort against the other co-beneficiaries; (3) the change or disposition wins the consent of the beneficiary; and (4) other circumstances stipulated in the trust documents."⁴⁹ Upon termination of the settlor is also entitled to receive the trust property in secondary priority after the beneficiary and his successors.⁵⁰

It is worth noting that some of the settlor's rights are uniquely regulated in Chinese law and have been questioned by jurists. In particular, article 2 of the *Trust Law of China* allows for the possibility of title to trust property being held by the settlor, rather than by the trustee. This possibility is totally unknown in common law and is highly unusual internationally. Likewise, the settlor's right to replace the beneficiary, given by article 51, usually does not exist in common law unless the settlor expressly reserved such right in trust documents. Moreover, the settlor's right to supervise the trust's management and administration, or to modify or even annul the trustees' disposition of trust property, enunciated in articles 20, 21 and 22, is usually not to be found in common law jurisdictions either, because the settlor automatically loses those rights when he transfers the trust property to others. As Ho explains,

41. *Id.* § 28.

42. *Id.* § 31.

43. *Id.* § 35.

44. *Id.* § 38.

45. *Id.* § 40.

46. *Id.* § 41.

47. *Id.* § 53.

48. *Id.* § 50.

49. *Id.* § 51.

50. *Id.* § 54.

[i]n relation to self-dealing transactions, given that any harm or loss will be suffered by the beneficiaries rather than the settlors, it is difficult to see why the latter should be given the right to authorize such transactions. [Moreover,] it is not inconceivable that a settlor who has settled property upon trust may wish to revoke his or her gift. The risk of giving powers to the settlor as above is that he or she may exercise these powers arbitrarily, or in preference for his or her own rather than the beneficiaries' interests.⁵¹

The unique regulations of the settlor's rights imply that most Chinese trusts are alter ego trusts.⁵² However, when the settlor is not the sole beneficiary, granting the same rights to both settlors and beneficiaries, or more specifically, retaining the beneficiary's rights as to settlors, as regulated in article 49, will cause conflicts between those two parties. Although these conflicts can be solved by the court, the efficiency of the trust's management will be decreased. Even though the trust contract may restrict the settlor's act, whether expressly or by necessary implication, such restrictions operate only at the level of obligation and do not invalidate juridical acts.⁵³ Therefore, the Chinese legislation grants too much power to the settlors and fails to provide sufficient restraints on the powers: It decreases the efficiency of trust management, increases the cost of trust administration, and confuses the trust with other legal institutions such as agency. While in other legal systems the trust, at least in comparison to other institutions has the advantage of being able to allow the trustee to manage the trust property in his own name and be immune from the interference of others, the current Chinese system reduces this advantage, and, consequently, weakens the attractions of the trust.⁵⁴

B. *Rights and Duties of the Trustee*

In this section, the author first indicates the trustee's capacity, as well as the situations for the trustee needed to assign duties and resign. After that, the author will present a detailed analysis of the obligations and rights of the trustee.

In Chinese law, "[a] trustee shall be a natural person or legal person who

51. HO, *supra* note 24, at 115-16.

52. GAO, *supra* note 25, at 267.

53. Kenneth G. C. Reid, *Conceptualising the Chinese Trust: Some thoughts from Europe*, in *TOWARDS A CHINESE CIVIL CODE: HISTORICAL AND COMPARATIVE PERSPECTIVES* 209, 211 (Remco van Rhee & Lei Chen eds., 2012).

54. TANG YIHU (唐义虎), *XINTUO CAICHAN QUANLI YANJIU* (信托财产权利研究) [STUDIES OF TRUST PROPERTY RIGHT] 59 (2005).

has full capability for civil conduct.”⁵⁵ Unlike settlors, unincorporated organizations cannot be trustees. The original trustee of the trust is appointed by the settlor upon the entry into the trust contract or the trustee’s acceptance of the trust.⁵⁶ Under the *Trust Law of China*, a trustee may be removed only under limited circumstances, specifically “[w]here the trustee disposes of the trust property against the purposes of the trust or commits gross negligence in administering, using or disposing of the trust property”.⁵⁷ In addition, Chinese trust law only leaves an extremely limited scope for a trustee to resign, which is considered to restrict the trustee’s power.⁵⁸ The trustee cannot resign in the absence of the consent of the settlor and beneficiary, even when there are enough trustees to manage the trust.⁵⁹ It is unclear whether this stipulation is mandatory or can be overridden by express provision in the trust instrument. This is different from the common law regulation where the trustee has the discretion to resign. Moreover, while most of the jurisdictions give the court power to permit a trustee to resign, no such provision can be found under the *Trust Law of China*. When the trustees’ appointment can be terminated according to article 39, the trust property will be kept on hold *ad hoc* until a new trustee is appointed.⁶⁰ In the case of joint trustees, if some of the trustees’ appointments are terminated, the other trustees will continue the administration.⁶¹

1. *Trustee’s Duties*

In managing the trust property for the beneficiary’s interests, the trustees “have the obligation to pay the beneficiary benefits from the trust with the limits of the trust property”.⁶²

(a) The Regulations of Fiduciary Duties and Their Limitations

The *Trust Law of China* enumerates the fiduciary duties of trustees. Article 25 states that “[t]he trustee shall abide by the provisions in the trust documents and handle trust business for the best interests of the beneficiary; [and] in administering the trust property, the trustee shall be careful in performing his duties and fulfill his obligations with honesty, good faith, prudence and efficiency.”⁶³ However, at least one Chinese commentator argues that this provision reduces the standard of trustee’s duty from that

55. Trust Law of China § 24.

56. *Id.* § 8.

57. *Id.* § 23.

58. GAO, *supra* note 25, at 270.

59. Trust Law of China §§ 38, 66.

60. *Id.* § 40.

61. *Id.* § 42.

62. *Id.* § 34.

63. *Id.* § 25.

required from the good administrator to that of a normal administrator taking care of his own property.⁶⁴ This compares unfavorably with the Chinese trust's common law counterparts, which generally subjects all trustees to general duty of care and prudence while also taking into account the knowledge and experience of individual trustees. These jurisdictions thus place demand a more rigorous duty of care from professional trustees.⁶⁵ Furthermore, there is no elaboration in article 25 or other provisions that explain what standard of prudence is expected from the trustee, and whether the standard varies depending on the type of trust involved. In this light, it is suggested that the Chinese law should be amended with reference to other jurisdictions and include a specific explanation of the standard of trustees' duty of care.

In addition to the general rule of the fiduciary duties in article 25, the *Trust Law of China* also lists other specific obligations of the trustee. It provides that "except obtaining remuneration according to the provisions of this Law, the trustee may not seek interests for himself by using the trust property"⁶⁶ or "convert the trust property into his own property".⁶⁷ Additionally, the trustee is prohibited from self-dealing or merging the trust property with his personal property. As it states, the trustee may not make transactions "between his own property and trust assets or between the trust's assets of different settlors, unless it is otherwise stipulated in the trust documents."⁶⁸ The trustee "shall administer the trust property separately from his own property and keep separate accounting books, and he shall do the same with regard to the trust property of different settlors".⁶⁹ These regulations comply with the rule of the independence of the trust property and prevent the trust property from falling into the hands of trustees' personal creditors.⁷⁰ It provides that the trust property comprises the initial settled property, and property lawfully and unlawfully obtained from the use, management or disposal of the initial property.⁷¹ Furthermore, despite the absence of express stipulation in the *Trust Law of China*, it is implied in article 25 that the trustee should also be prohibited from engaging in any business in competition with the trust.

64. YU HAIYONG (于海涌), YINGMEI XINTUO CAICHAN SHUANGCHONG SUOYOUQUAN ZAI ZHONGGUO DE BENTUHUA (英美信托财产双重所有权在中国的本土化) [HOW TO LOCALIZE THE BRITISH AND AMERICAN LAW ON TRUST PROPERTY IN CHINA] 162 (2011).

65. HO, *supra* note 24, at 106-07.

66. Trust Law of China § 26.

67. *Id.* § 27.

68. *Id.* § 28.

69. *Id.* § 29.

70. However, there is no provision of the segregation of trust fund capital and interest in Chinese trust law. The importance of such segregation is not recognized because non-commercial private trusts have not been adopted in China.

71. Trust Law of China § 14.

However, the Chinese provisions of the trustee's fiduciary duties seem to be vague, and there are both gaps and overlaps in the provisions as compared to systematic and comprehensive regulations in common law. The *Trust Law of China* only stipulates the general rules of fiduciary duties in article 25 in very broad terms and provides a sporadic list of specific fiduciary duties. It is unclear whether a trustee has any fiduciary duties in situations that are not specially regulated. Moreover, Chinese law does not recognize the duty of impartiality, given that most of the trusts in China are short-term, alter ego trusts with no complicated conflicts of interests existing between the beneficiaries.⁷² Another outstanding issue, or gap in the regulation of fiduciary duties, is the burden of proof. The *Trust Law of China* has no provision stating how the burden of proof should be allocated. According to article 64 of the *Civil Procedure Law of the People's Republic of China* (hereinafter referred to as *Civil Procedure Law of China*)⁷³, it would be the duty of settlors or beneficiaries as the claimant to provide evidence in support of his allegations against the fiduciary. This would be extremely difficult in practice for the settlors or beneficiaries to prove that the trustee has not acted in the best interest of the beneficiaries.⁷⁴ Therefore, an express provision should be regulated in Chinese trust law to shift the burden of proof to trustees in order to show that they indeed have acted in the best interest of the beneficiaries.

As to the problem of overlaps in the provisions, an example can be found in article 22. It states that "[w]here the trustee disposes of the trust property in breach of the purposes of the trust, or causes losses to the trust property due to his departure from his administrative duties or improper handling of trust business, [he shall] restore the property to its former state or make compensation."⁷⁵ However, the duty of "departure from his administrative duties" involves an "improper handling of trust business", thus creating an overlap and potential conflict. As if to add to the confusion, these two phrases are not defined, creating difficulties in the implementation of the law. For instance, it is unclear whether an improper handling arises when the trustee has not breached any specific duty but has nonetheless caused loss to the trust property, such as when he has made an unprofitable

72. GAO, *supra* note 25, at 283.

73. Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm' Nat'l People's Cong. Apr. 9, 1991, amended Oct. 28, 2007), § 108 (Lawinfochina) (China) [hereinafter *Civil Procedure Law of China*]. The article states that "The following conditions must be met when a lawsuit is brought: (1) the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case".

74. CHEN XUEPING (陳雪萍) & DOU JINGJUN (豆景俊), XINTUO GUANXI ZHONG SHOUTUOREN QUANLI YU HENGPING JIZHI YANJIU (信托关系中受托人权利与平衡机制研究) [TRUSTEES' RIGHTS AND THEIR BALANCE MECHANISM UNDER THE TRUSTS] 222 (2008).

75. Trust Law of China § 22.

investment.

(b) The Regulations of Duty to Act Personally and their Limitations

In addition to the fiduciaries duties, the trustee is also required to act personally when carrying out the trust's business. According to article 30, "[t]he trustee shall handle trust business himself."⁷⁶ With regard to this duty, questions arise as to when the delegation should be allowed, what duties a trustee owes in the delegation, and when the trustee should be liable for the acts of a third party. As to the first question, delegation under the *Trust Law of China* is essentially allowed on the ground of necessity, i.e. for when the trustee "has to do so for reasons beyond his control [or] where the trust documents provide otherwise".⁷⁷ This regulation is much more restrictive than the common law approach that permits delegation on the ground of prudence or simply grants a general power of delegation to the trustees. For example, the Trustee Act 2000 of England and Wales provides that "[a] trustee is not liable for any act or default of the agent, nominee or custodian unless he has failed to comply with the duty of care applicable to him."⁷⁸ "Given the increasing sophistication and specialization of modern commercial transactions, it is submitted that a broad power of delegation ought to be granted to trustees."⁷⁹ The Chinese approach runs a serious risk of hindering the trustee's administration of the trust.

With respect to the second question, Chinese law is silent. Nevertheless, in order to prevent trustees from abandoning their duties through provided delegation, it ought to be a given that the trustees should exercise due care and skill in appointing and supervising the agent. This is a position adopted by most jurisdictions. As to the third question, namely when should a trustee be liable for the acts of a third party, the Chinese law provides in article 30 that the trustee "shall bear the responsibility for the acts committed by that person in handling such affairs."⁸⁰ This is different from international practice, which holds a trustee liable for the agents' defaults if he fails to exercise care or prudence. In light of these discrepancies, the *Trust Law of China* should be amended to make it better fit with international practice.⁸¹

(c) The Regulations of Duty to Account and Their Uncertainty

Another duty of the trustee is the duty to keep accurate accounts. Legislatively, this done by stipulating that the trustee shall "at regular intervals every year, report to the settlor and beneficiary on the administration and disposition of the trust property and the income and

76. *Id.* § 30.

77. *Id.*

78. Trustee Act, 2000, c. 29, § 23 (1) (2000) (U.K.).

79. HO, *supra* note 24, at 109.

80. Trust Law of China § 30.

81. HO, *supra* note 24, at 109.

expenses relating to the property.”⁸² In charitable trusts, the requirement is slightly different: “[t]he trustee shall, at least once a year, make a report on the trust business handled and the status of assets disposed of, and upon acceptance by the trust supervisor, the report shall be submitted to the public welfare administration authority for examination and approval, and the trustee shall announce the report.”⁸³ In applying these provisions, uncertainty arises as to the consequences of the trustee’s failure to discharge such duties. Currently, the only route to obtain remedies for breaches of these duties is to see whether the breaches are falling into the duty regulated by article 22 – improper handling of trust affairs or breach of his management responsibilities. If yes, the trustee is obliged to restore the trust property to its original state or to pay compensation if loss is caused by the breach.⁸⁴ If no, the result is unclear. Therefore, in order to offer greater clarity to potential beneficiaries, Chinese law ought to be amended based on comparative studies of other jurisdictions and entitle a beneficiary or a settlor the right to compel a trustee to render accounts when the trustee refuses to do so, or to appoint an independent professional or the court to prepare the trust accounts while all relevant costs are borne by the defaulting trustee.⁸⁵

2. *Trustee’s Rights*

This section indicates the rights of the trustee under the *Trust Law of China*. It analyses the right to remuneration and the right of indemnity, and examines current limitations of existing regulations. Finally, it proposes amendments to these regulations.

The only benefit that a trustee can anticipate from the management of trust property is remuneration.⁸⁶ After the termination of trusts, the trustee is entitled to two means of redress to exercise the right to request remuneration from the trust property: “he may have a lien on the property or raise the request to the owner of the property”.⁸⁷ However, this regulation causes a number of problems: first, a Chinese lien can only be established over movable property.⁸⁸ The trustee however, could lose this statutory protection

82. Trust Law of China § 33.

83. *Id.* § 67.

84. *Id.* § 22.

85. HO, *supra* note 24, at 97-98.

86. Trust Law of China § 35.

87. *Id.* § 57.

88. Zhonghua Renmin Gongheguo Wuchan Fa (中华人民共和国物权法) [Property Law of the People’s Republic of China] (promulgated by the Standing Comm’ Nat’l People’s Cong. May. 16, 2007, effective Oct. 1, 2007), 2007(3) STANDING COMM’ NAT’L PEOPLE’S CONG. GAZ. 4, § 230 (China).

if the trust property happens to be real property. In addition, the Chinese concept of lien requires the creditor to be in physical possession of the property.⁸⁹ This could cause practical difficulties for a Chinese trustee who may not often be given possession of the property in question. Therefore, it is doubtful whether the imposition of the lien offers the Chinese trustee the same protection as that enjoyed by a common law trustee. In this light, amendments to the Chinese law have been proposed in order to remove restrictions on the type of trust property. Further suggestions advance the notion that the lien of the trustee should be expanded to real estate. Finally, commentators argue that the trustee ought to be entitled to obtain priority repayment from the value of the property as determined by valuation or from the proceeds of sale by auction of the property upon the termination of trust.⁹⁰

In addition to the right of remuneration, the trustee also has a right of indemnity. Where the trustee effects a payment owed to a third party during the course of discharging his duties as administrator of the trust's business in advance with his personal property, he has the right to be paid in priority with the trust's properties. Any remaining debts in this circumstance would be borne by the trust property.⁹¹ However, a preliminary question to ask is whether the expenses or liabilities are properly incurred or not. According to article 37, the trustee will not be indemnified if the debts owed to a third party or the losses suffered by the trustee are "as a result of his departure from his administrative duties or his improper handling of trust business".⁹² With respect to this regulation, Professor Ho argues that it is too vague to be of much use. Moreover, she states that the wording of article 37 should be interpreted broadly to refer to "any breach of the trustee's duties as set out in the Trust Law and in the trust instrument".⁹³ Even with this said, article 37 is still more stringent than the approach adopted in international practice. For example, English case law allows a trustee who acts in good faith to be indemnified to the extent that the unauthorized act benefits the trust estate,⁹⁴ or where such an act was expressly or impliedly consented to by the beneficiaries.

Moreover, another problem is that in order to secure the trustee's right of indemnity, article 37 grants the trustee the right to obtain priority repayment from the trust fund; however, article 37 lacks an explanation of the nature of such a right and how it compares with security interest. In

89. *Id.*

90. HO, *supra* note 24, at 102-03.

91. Trust Law of China § 37.

92. *Id.*

93. HO, *supra* note 24, at 123.

94. *Vyse v. Foster*, (1872) L.R. 8 Ch. App. 309, 336-37.

Chinese law, the rights of priority repayment, as opposed to security rights, are rights over debts that are specially protected by laws and regulations. There is an overwhelming opinion within Chinese doctrine that the nature of the right of priority repayment articulated in article 37 is the right to obtain payment from the trust fund, and ranks ahead of the rights of all secured and unsecured creditors.⁹⁵ Support for this argument can be found in an opinion of the Supreme People's Court on article 286 of the *Contract Law of China*, which grants similar right of priority repayment for the price of construction projects and clarifies that such a right ranks ahead of mortgage rights and other rights over debts.⁹⁶

3. *Trustee's Powers*

In addition to the above-listed rights, the trustee holds powers over the trust property. He holds these powers in order to enable the management and administration of the trust to the same extent as an absolute owner. However, there is no such granting of power to be found in the *Trust Law of China*. The only article that mentions the trustee's powers of administration is article 2. When defining the notion of trust, this article stipulates, in very broad terms, that the trustee is entrusted the settlor's property rights and is allowed to administer or dispose of the trust property in his own name. However, there is no provision that clearly regulates what specific powers the trustee should have, or whether it simply embraces the power to maintain the trust property or also involves the power to invest, lease or insure relevant properties. This is an enormous gap, and requires an amendment to the regulation of trustee's powers.

Another amendment that needs to be made is to the Chinese regulation of the variation of trust administration in article 21 and article 69. It is submitted that these provisions should be revised in order to provide maximum flexibility for the administration of trusts. As Professor Ho suggests, "the requirement of the occurrence of unforeseeable circumstances can be abandoned; it could simply be stated that the method for administering the trust could be varied if it is in the interest of the beneficiaries as a whole."⁹⁷ Since there is no express provision that regulates whether articles 21 and 69 are permissive or mandatory, a clarification should be added that the statutory powers under those two

95. Ho, *supra* note 24, at 124.

96. Zuigao Renmin Fayuan Guanyu Jianshe Gongcheng Jiakuan Youxian Shouchangquan Wenti De Pifu (最高人民法院关于建设工程价款优先受偿权问题的批复) [Reply to the Question Concerning the Right of Repayment of the Price of Construction Projects] (promulgated by Sup. People's Ct., Jun. 11, 2002, effective Jun. 27, 2002) (Lawofchina) (China).

97. Ho, *supra* note 24, at 130.

articles can be overridden by express provisions in the trust instrument. The *Trust Law of China* is unique in giving the settlor the power to vary the administration of the trust without any judicial scrutiny in article 21 and to adversely change the entitlement of the beneficiaries in article 51. Amendments are also needed to these regulations so as to properly protect the beneficiaries' interests and to prevent the settlor from abusing the trust.⁹⁸

In short, a comparison of the regulations of rights and obligations of the settlor as well as the duties imposed on the trustee by the *Trust Law of China* reveal that the Chinese provisions are broadly similar to those found in common law. However, and in contrast to the common law, Chinese law does not seek to preserve the independent discretion of the trustee in acting in a manner that he considers to be in the best interests of the beneficiaries.⁹⁹

C. *The Capacity and Rights of the Beneficiary*

In the *Trust Law of China*, the beneficiary is defined as “the person that enjoys the right to benefit from a trust. He may be a natural person, legal person or an organization established according to law”.¹⁰⁰ Unlike in the case of settlors and trustees, beneficiaries need not have civil capacity, which means infants and unincorporated organizations that do not have legal personalities can be beneficiaries. Furthermore, and consistent with international practice, both settlors and trustees can be beneficiaries. In this case however, the trustee/beneficiary may not be the only trustee. There is no provision outlining whether the beneficiary should exist at the time of the trust's formation. However considering that there is no problem should a beneficiary be absent prior to the distribution of trust benefit, the existence of a beneficiary upon the creation of trust does not seem to be required as long as the beneficiary can be identified during the trust's duration. This complies with the both trust's purpose and with Anglo-American law.¹⁰¹

Knowing the capacity of the beneficiaries, we can now discuss the rights of the beneficiaries. According to the statute, beneficiaries are entitled to “benefit from a trust beginning from the date the trust becomes effective, unless otherwise stipulated in the trust documents.”¹⁰² In the event that the beneficiary “cannot repay the matured debts, his right to benefit from a trust may be used to repay the debts, except this is restricted by provisions in laws, administrative regulations and trust documents.”¹⁰³ As Professor Ho

98. *Id.* at 131.

99. Ho, Lee & Jinping, *supra* note 9, at 89, 91.

100. Trust Law of China § 43.

101. ZHOU, *supra* note 19, at 125.

102. Trust Law of China § 44.

103. *Id.* § 47.

notes, “in this way, the [Chinese] Trust Law permits the creation of American-style spendthrift trusts or English-style protective trusts, which aim at making appropriate provisions to the beneficiaries, but which also restrict them from disposing of the property as they wish.”¹⁰⁴ It is worth noting that the beneficiaries can dispose of this right to benefit: according to article 46, they may either give up this right or instead transfer the right. In the case of co-beneficiaries, according to article 45, “the co-beneficiaries shall enjoy the benefits from a trust according to the provisions in the trust documents. Where no percentage or methods for distribution of the benefits from the trust are specified in the documents, all the beneficiaries shall enjoy the benefits equally.”¹⁰⁵ Compared to the common law approach, this Chinese provision is less stringent because it does not require the certainty of beneficiary’s share and allows this to be cured by equal division.¹⁰⁶

In addition to the right to benefit, beneficiaries can also claim against the trustees pursuant to article 49. This article states that beneficiaries “may exercise the rights that the settlor enjoys as stipulated in article 20 through 23.”¹⁰⁷ This means that the beneficiary retains not only the right to use and dispose of assets in the trust, as well as the income and expenses relating to his trust property, but also that he has the right to check the trust account, ask the trustees to modify their administration, apply to the People’s Court for annulling trustee’s improper disposition, ask the trustee to restore the property, or even dismiss the trustee according to the provisions in the trust documents or by application to the People’s Court. Moreover, the beneficiaries are given powers, again along with the settlor, to help fill gaps in the trust instrument and to facilitate the smooth administration of the trust. In other words, in the absence of provision in the trust instrument, the beneficiaries can give consent to transactions conducted by the trustee between his own property and trust assets at fair market price,¹⁰⁸ resolve disagreement between joint trustees in the administration of trust,¹⁰⁹ give consent to the trustee’s resignation,¹¹⁰ and approve the report submitted by the trustee on his administration of the trust upon the termination of the trust in certain circumstance.¹¹¹ Additionally, the beneficiary is entitled to appoint another person as the trustee where the person designated in a testament

104. HO, *supra* note 24, at 117-18; *see also* Zhonghua Renmin Gongheguo Zhengquan Touzi Jijin Fa (中华人民共和国证券投资基金法) [Law of the People’s Republic of China on Securities Investment Funds] § 15, it appears that the Trust Law of China does not permit self-settled spendthrift trust, which involve the settlor as the sole beneficiary or a co-beneficiary of a spendthrift trust.

105. Trust Law of China § 45.

106. HSIAO, *supra* note 31, at 234.

107. Trust Law of China § 49.

108. *Id.* § 28.

109. *Id.* § 31.

110. *Id.* § 38.

111. *Id.* § 41.

refuses or is unable to act as a trustee pursuant to article 13,¹¹² and to appoint a new trustee when the trustee's appointment is terminated according to article 40.¹¹³ However, Professor Ho denies the wisdom of those two provisions. As she argues "[allowing] a beneficiary to appoint a trustee is to ignore the need for maintaining the crucial check and balance between the trustee and the beneficiaries."¹¹⁴

However, the beneficiary's role in the trust relationship in China is significantly different when compared to its common law counterpart. Apart from the right to receive distribution, the beneficiary's entitlements to monitor the trustee and bring actions for breach are granted by way of duplication of the settlor's rights, as discussed earlier. Such duplication suggests that the administration of the Chinese trust will be shadowed by the conflicting interests between the settlor and the beneficiaries: given the lack of statutory guidance in the law as to whose interests should take priority, there is a great risk that under the current legal regime beneficiary's rights could be encroached upon by settlors. Admittedly, this might not be the case in the investment trusts so are prevalent in China in which investors are both settlors and beneficiaries. However, the issue could become prominent if other trusts that are not alter ego trusts, such as family trusts, were to take off in China.¹¹⁵

After outlining the regulations of settlor rights and obligations, as well as those of trustees and beneficiaries, the *Trust Law of China* prescribes the termination of trusts and the charitable trusts in the following chapters.

III. MAIN PROBLEMS OF THE CHINESE TRUST SYSTEM

After offering a detailed examination of the provisions of the *Trust Law of China*, this section concludes by examining the significant limitations of the Chinese trust system. In addition to the gaps and overlaps of the regulations of the rights and obligations of trust parties, the biggest problem of the *Trust Law of China* is that it avoids dealing with the key issue of the ownership of trust property. As a consequence, the *Trust Law of China* causes renders ambiguous the ownership of trust property and unclear nature of beneficiary's rights.¹¹⁶

112. *Id.* § 13.

113. *Id.* § 40.

114. HO, *supra* note 24, at 121.

115. Ho, Lee & Jinping, *supra* note 9, at 93.

116. YU, *supra* note 64, at 11, 13.

A. *Ambiguous Ownership of Trust Property*

In contrast to dual ownership under common law, ownership in China is absolute and indivisible, as it is in most civilian jurisdictions. Therefore, the ownership of trust property is a serious problem in the introduction of trusts in China. Regrettably, Chinese legislation has remained silent on this issue. There is neither direct reception of dual ownership nor clear stipulation of unitary ownership in the *Trust Law of China*; and the Supreme People's Court of China issued no judicial interpretation in relation to this issue. Instead, academics hold different opinions on the ownership of trust property. As a result, the lack of clarity and contending theorists creates ambiguity. This is reflected by both statutory ambiguity and interpretation ambiguity.

1. *Statutory Ambiguity*

Article 2 of the *Trust Law of China* regulates that:

[F]or purposes of this Law, a trust refers to that the settlor, based on his faith in trustee, entrusts his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes.¹¹⁷

Instead of adopting the term of “transfer” that is used in common law, this article chooses the expression of “entrust” (委托) the property to describe the relationship between a settlor and a trustee. However, in Chinese law, “entrust” is not a unique legal term used to describe a trust relationship. On the contrary, it is typically adopted in agency relationships or in mandates, where the transfer of property is not required.¹¹⁸ Therefore, use of the term of “entrust” blurs the line between the trust and agency, causing the misunderstanding which incorrectly holds that that trusts do not require transfer of trust property.

Fittingly the vague term “entrust” leaves open the question of the ownership of trust property, which, as it so happens, remains unanswered by

117. Trust Law of China § 2.

118. See Zhonghua Renmin Gongheguo Minfa Tongtze (中华人民共和国民法通则) [General Principle of the Civil Law of the People's Republic of China] § 64; Zhonghua Renmin Gongheguo Hetong Fa (中华人民共和国合同法) [Contract Law of the People's Republic of China] (promulgated by the Standing Comm' Nat'l People's Cong. Mar. 15, 1999, effective Oct. 1, 1999), 1999(2) STANDING COMM' NAT'L PEOPLE'S CONG. GAZ 104, § 396 (China).

the *Trust Law of China*. This seems almost deliberate: the *Trust Law of China* consistently adopts ambiguous expressions in its constituent parts which indicate either laxness in drafting, or more likely, confusion as the nature of ownership. For example, article 14 states that “[t]he property obtained by the trustee due to a trust accepted is trust property”.¹¹⁹ The expression of “obtains” (取得) seems to recognize the transfer of ownership; however, the same term “obtain” is also used in agency law to refer to the agent’s acquisition of possession, as opposed to ownership of relevant property.¹²⁰ Similarly, article 16 provides that “[t]he trust property shall be segregated from the property owned by the trustee”.¹²¹ Such a drafting seems to imply that a trustee is the owner of trust property, whereas article 15, by contrast, adopts the same stipulation for settlors.

Moreover, the *Trust Law of China* avoids saying that settlors and trustees are co-owner of the trust property, and refrains from distinguishing when these two provisions would apply.¹²² Specifically, articles 15 and 16 seem to only aim at imposing the duty of segregating trust property from personal property on the settlor and the trustee instead of authorizing them the ownership of trust property. Support for this opinion can be found in the *Law of the People’s Republic of China on Securities Investment Funds*, which stipulates that “fund property shall be independent from the property owned by the fund manager and fund trustee”¹²³ while only the fund trustee but not the fund manager owns the fund assets.

In addition, pursuant to article 9 of the *Trust Law of China*, whether the transfer of ownership takes place seems to depend on the terms of the trust contract or decisions made by the settlors when there are no such terms regulated in the trust contract. The article stipulates that:

[T]he following items shall be stated clearly in the written documents required for the creation of a trust:

...

(4) the scope, types and status of the assets under trust;
and

...

In addition to the items mentioned above, the period of the trust, the methods for the administration of the property under trust, remuneration payable to the trustee, manner for

119. Trust Law of China § 14.

120. Rebecca Lee, *Conceptualizing the Chinese Trust*, 58 INT’L & COMP. L.Q. 655, 660 (2009).

121. Trust Law of China § 16.

122. Ho, *supra* note 2, at 195.

123. Zhonghua Renmin Gongheguo Zhengquan Touzi Jijin Fa (中华人民共和国证券投资基金法) [Law of the People’s Republic of China on Securities Investment Funds] § 6.

appointing another trustee, the cause for termination of the trust, etc. may be stated clearly.¹²⁴

2. *Interpretation Ambiguity*

Not only is legislation silent on the issue of the transfer of ownership, neither legislative interpretation nor judicial interpretation clarifies whether the term “entrust” could be interpreted as “transfer”. The Supreme People’s Court has issued no judicial interpretation on the *Trust Law of China*. Although other People’s Courts have interpreted “entrust” in relation to the ownership of trust property, these decisions unfortunately lack the effect of legal interpretation because precedents are not a source of law and do not bind subsequent case decisions in China. Further difficulties arise given that certain case decisions either bypass the *Trust Law of China* or stand in conflict with it. For instance, in *Beijing Haidian Science & Technology Development Co. Ltd v Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsì and Others*,¹²⁵ the Higher People’s Court of Chongqing rejected the argument that the trustee is the owner of trust property and held that either the settlor or the beneficiary was, or even both of them were, the owner of the trust property. It stated that either the settlor or the beneficiary had the right to bring action in a title dispute against a third party over the trust property. The trustee, as a titular owner, does not have a direct interest in a title dispute. So pursuant to article 108(1) of the *Civil Procedure Law of China*, he or she can only participate in the litigation as a third party but is not able to make any title claim against a third party. Similar views can be found in *Yanxin Co Ltd v Huabao Trust and Investment Co Ltd*. However, the *Trust Law of China*, even article 2, never denies a trustee to be the owner of trust property. Significantly, these cases are not an aberration of the People’s Courts’ perception of the trust, but are evidence that the trust is conceptualized as a subspecies of contract in China. The Courts had no difficulty invoking the *Contract Law of China* to characterize the assignment of rights and obligations, both internal and external, of trust parties.¹²⁶

124. Trust Law of China § 9.

125. Beijing Haidian Keji Fazhan Youxian Gongsì Su Shenzhenshi Xinhua Jinyuan Touzi Fazhan Youxian Gongsì Deng (北京海淀科技发展有限公司訴深圳市新华锦源投资发展有限公司等) [Beijing Haidian Sci. & Technology Dev. Co. Ltd. v. Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsì et al.], 2006 CHONGQING HIGH PEOPLE’S CT. 14 (Chongqing High People’s Ct. Mar. 19, 2007) (China).

126. Ho, *supra* note 2, at 205-06.

3. *Reasons for the Vague Regulation of the Chinese Law and Its Problems*

The Chinese regulation of trust ownership, neither preventing a trustee from obtaining the ownership nor mandating that the settlor shall be the owner, is a deviation from international practice. It is not only different from the common law rules, but also alien to its neighboring civil law jurisdictions (i.e. Japan).¹²⁷ Although the *Hague Trust Convention* does not require the transfer of a trust asset in its article 2, it still provides that the asset be held under the control of the trustee. China's unique approach is the result of a last-minute change, since all the earlier drafts of the law contemplate the transfer of the settlor's property to the trustees.¹²⁸

Questions may arise as to why the Chinese legislature chose to adopt vague expressions rather than use the term "transfer". One reason lies in the concern that once the ownership was clearly vested in the hand of the trustee, the trustee's rights might become over expanded and consequently the settlors' right to supervise the management of the trust would be affected. Unlike common law ownership, ownership in China is absolute and indivisible. Therefore, in the drafters' perspective, the choice of the term "entrust", as opposed to "transfer", was not an oversight. Professor Jiang Ping, the *Trust Law of China*'s main drafter, considered it an innovation of the Chinese law to leave open the issue of the location of ownership. In his opinion, the *Trust Law of China* only needed to provide that a trustee is authorized to manage and administer trust properties, so as to draw an adequate balance between the need to grant trustees the right to dispose of trust property and to protect beneficiaries' rights. Moreover, because most of the trusts established in China aim to be collective investment schemes, the investors would transfer their investment to the trustees anyway, therefore the drafters do not think it urgent to entitle the ownership of trust property to the trustees.¹²⁹ For the purposes of collective investments then, studied vagueness was at least appropriate, or, in the circumstances not as inappropriate as it would later become.

Yet because the trust is no longer restricted to collective investment, studied ambiguity can no longer suffice. Therefore, in order to adapt to the rapid development of the trust and its broad application in China, amendments to the regulation of ownership in the *Trust Law of China* are

127. HO, *supra* note 24, at 66.

128. *Id.* at 66-67; *see also* Trust Law of China article 3 (in the 1996 and 2000 drafts) requires the transfer of assets to the trustee; it follows the relevant part of article 1 of the Xintuo Fa (信托法) [Trust Law] (Taiwan), 1996 word by word; *see also* Lusina Ho, *PRC Trust Law: Opportunity or Danger?*, in LAW LECTURES FOR PRACTITIONERS 2002 87 (Richard Wu & Felix Chan eds., 2002).

129. HO, *supra* note 2, at 201-02.

required. Rather than resolving the concerns of the drafters, these vague expressions work against drafter's intention to entitle the trust management to the trustee and to equally protect the beneficiaries' interests. Instead, vagueness leaves room for settlors to choose whether to transfer the ownership to their trustees. However, because settlors are usually reluctant to relinquish their ownership of property to a stranger-trustee if no enforceable obligation is imposed, settlors are likely to abuse such ambiguity in order to retain the ownership of trust property in contravention of the original design of the trust.

In the absence of a clear entitlement of trust property therefore, the balance of interests between trust parties is destroyed and the efficiency of trust management is decreased. As Professor Ho said: "the absence of ownership will significantly limit the trustee's powers to act in his own name as envisaged by the Trust Law, and this will limit in turn the convenience that a trust relationship is supposed to bring."¹³⁰ Indeed, it is difficult to see how a trustee can obtain any independent control of the trust property and manage efficient trust administration without having the ownership of property. The settlor's retention of the ownership requires the trustee to seek the settlor's consent and cooperation in every disposition of the trust property. Additionally, the *Trust Law of China* grants considerable powers to the settlor to monitor the trustee.¹³¹ Should the trustee sets up hurdles in order to safeguard the trustees' management of trust assets, there is a great risk that the settlor might misappropriate the trust contrary to the terms of the trust, unbeknownst to the trustee. In such cases, the redresses available to the beneficiaries may at best be theoretical and at worst nonexistent. Given that none of the provisions of the *Trust Law of China* imposes any specific duties on a settlor to segregate trust property, observe the terms of the trust or to refrain from misappropriating trust property the beneficiary may find himself bereft of legal benefit. Even such provisions were to exist for beneficiaries, the *Trust Law of China* does not provide any remedies for breach by the settlor. Moreover, no provision is made in the Chinese law for the replacement of settlors. Consequently, if a settlor, the apparent owner of trust property, dies, the trust assets will be left in a sort of legal limbo given that the trust assets do not fall to the settlor's heirs according to article 15. Likewise, questions will arise as to "under whose name the trust assets should be registered, to whom tax liabilities should be charged, and who has the title to sue upon torts infringing the ownership rights over the assets".¹³²

130. *Id.* at 200.

131. *See* Trust Law of China §§ 21-23.

132. HO, *supra* note 24, at 68.

B. *Outstanding Characteristic of the Beneficiary's Right*

A beneficiary holds “equitable ownership” under the dual ownership of common law. How to interpret this ownership and what is the nature of a beneficiary’s right has been a key issue of the introduction of trusts in China. Unfortunately, like the issue of trust ownership, the Chinese legislation again adopts an evasive nomenclature, which makes the nature of the beneficiary’s rights another unresolved difficult to pin down.

As discussed, the Trust Law of China provides that a beneficiary is entitled to benefit from a trust. It also establishes that this right is assignable and inheritable, and extends to exchange products lawfully or unlawfully obtained by the trustee and still held in his hands. Moreover, the beneficiary has the right to ask the trustee to adjust the methods of management of trust property, and to apply to the People’s Court to annul the trustee’s disposition of trust property, as well as to ask the trustee to restore the property to its former state or make compensation. In other words, the beneficiary has the right to enjoy the trust benefits and can claim against trustees or exclude third parties’ interference by annulling trustees’ wrongful disposition.

However, there is no explicit provision in the Trust Law of China that regulates the nature of the beneficiary’s rights. It does not indicate whether the right to claim against trustees and the right to exclude interference from third parties are in the essence of real rights or personal claims. What makes this “vacuum” of legislation more complex is that various theories arise to interpret the nature of the beneficiary’s rights in academia. For instance, the theory of real rights states that trustees’ legal ownership is only a right of management, while the beneficiary’s equitable ownership is the real title.¹³³ In contrast, the theory of personal claim posits that the beneficiary’s right is in the nature of a debt. Equitable ownership would thus entitle the beneficiary to personal claims against trustees. As a compromise of the foregoing two theories, the theory of co-existing real rights and personal claim takes the position that the beneficiary’s right has the dual nature of a personal claim against trustees and a real right over trust property.¹³⁴ In addition, a novel theory, termed as special right theory, simply defines the beneficiary’s rights as a special right due to the difficulties in fully integrating it into either real rights or a personal claim.¹³⁵ Likewise, some

133. Wen Shiyang (温世扬) & Feng Xingjun (冯兴俊), *Lun Xintuo Caichan Suoyouquan—Jianlun Woguo Xiangguan Lifa De Wanshan* (论信托财产所有权—兼论我国相关立法的完善) [Ownership of Trust Property: On the Improvement of China’s Legislation], 2005(2) WUHAN UNI. J. (PHILOSOPHY AND SOC. SCI.) 203 (2005).

134. JER-SHENQ SHIEH (謝哲勝), *XINTUO FA ZHONGLUN* (信託法總論) [GENERAL TRUST LAW] 14 (2003).

135. Jia Linqing (賈林青), *Xintuo Caichan De Falu Xingzhi Han Jiegou Zhi Wojian* (信托财产

commentators describe the beneficiary's right as a trust property right (信托财产权) which is an independent civil right similar to intellectual property rights and rights over shares.¹³⁶ However, as with the special right theory, there is little room under the present Chinese law to accommodate a new type of right.

In short, while the *Trust Law of China* took the bold step of incorporating the trust into China and shed lights on the introduction of trusts in civilian jurisdictions, much more work needs to be done for it to work properly. The law avoids the key issue of ownership of trust property and has instead succeeded in introducing the trust as a species of contract subject to pre-existing contractual statutes. Ambiguities in the statute's wording have created considerable hurdles for lawyers trying to understand the nature of the beneficiary's rights, businessmen trying to efficiently manage the trust, and those tasked with safeguarding the independent exercise of discretion of the trustee. As it stands, the *Trust Law of China* is a piece of broad and general legislation with gaps and ambiguities to be fleshed out in the course of the development of a more comprehensive legal and regulatory regime for the trust.¹³⁷ Clearly, work remains to be done: since its promulgation in 2001, the *Trust Law of China* has never been amended and all the regulations of trust companies stay at the level of CBRC regulations rather than administrative regulations of the State Council.¹³⁸ As a result, the Chinese rules of trust fall behind the development of trust business.¹³⁹ In consideration of all the uncertainties of the Chinese trust law discussed in this paper, it is necessary and important to propose amendments to the Chinese trust law, in particular to propose a better understanding of trust ownership in China. Using an analysis that focuses on comparing function, rather than form, the author believes that the concept of dual ownership is not an obstacle to the introduction of the trust in China and the key to understanding the interpretations of dual ownership is through an explanation that can be called the "binary system of real rights and personal claims". On this approach, the common law's legal ownership corresponds to a civilian trustee's unitary ownership in real rights, and the common law's equitable ownership corresponds to a special kind of personal claim.

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136. SHI Tiantao (施天涛) & YU Wenran (余文然), XINTUOFA (信托法) [LAW OF TRUSTS] 60 (1999).

137. Ho, Lee & Jinping, *supra* note 9, at 97.

138. ZHIXIN ZICHAN GUANLI YANJIUYUAN (智信资产管理研究院), *supra* note 29, at 205.

139. *Id.* at 202.

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中國信託法及其局限：信託權利義務及信託財產所有權問題研究

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摘 要

為基於信託在投資、銀行、金融和財產管理領域的優勢，中國大膽得引進了信託制度。作為英美法系衡平法的產物，信託制度被視為中國法的異類，尤其與一物一權的中國物權體系格格不入。因此，中國引進信託法的道路崎嶇但最終於2001年頒布了中華人民共和國信託法。然而此法迴避了信託財產所有權認定這個基本問題並由此導致了一系列具體法律規定上的漏洞，例如所有權制度模糊和受益人權利不確定。此文在研究中國信託歷史發展和信託產業法律整頓的基礎上，對中華人民共和國信託法相關規定及其主要問題進行分析。

關鍵詞：中華人民共和國信託法、信託法的相關問題、信託當事人的權利義務、信託財產、中國信託的歷史發展

